84-550

No.

In the Supreme Court of the United States

October Term, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BRAE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

This is a case of first impression concerning the proper role of court and agency in implementing the exemption power delegated by Congress to determine the extent and timing of deregulation. Specifically, this case raises the question whether the court impermissibly substituted its economic analysis for that of the agency and thus gave no deference to the following predictive judgments of the Commission as to the impact of the exemption:

1. Carriers will not cancel their efficient joint rate connections.
2. Large carriers will not force smaller carriers to accept revenues that are inadequate for their financial health.
3. The partial boxcar exemption will result in market forces more efficiently allocating boxcar car hire services.

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OPINIONS BELOW

The opinion of the court of appeals (App A, *infra*, 1a-95a) is not yet reported. The decision of the Interstate Commerce Commission (Apps. D, E, and F, 103a-152a, 153a-189a, and 191a-217a) are reported at 367 I.C.C. 423 *(Boxcars I)* and 367 I.C.C. 745 *(Boxcars II)*.

JURISDICTION

The judgment of the court of appeals (App. H, 218a) was entered on June 27, 1984. The Commission's timely petition for rehearing was denied on August 27, 1984 (App C, 96a). The Court's jurisdiction is invoked under 28 U.S.C. 1254(a) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. 10505 are set forth at App. G, *infra*, 217a.

STATEMENT

The Commission exempted boxcar traffic from rate and car service regulation in response to a Congres-

sional mandate to eliminate regulation where it is not needed to protect shippers from an abuse of market power or to carry out the rail transportation policy of 49 U.S.C. 10101a. The market for the transportation of boxcar commodities is extremely truck competitive. In the face of this competition, and hampered by many regulatory restraints, the most significant of which relate to joint rates and car service practices, the railroad share of the market has been rapidly declining. The purpose of the exemption is to give carriers marketing flexibility and the ability to control their own costs so that they can compete more effectively among themselves and with other modes.

The Commission administers a pervasive scheme of railroad rate regulation that includes the mandatory publication and filing of tariffs by carriers specifying all freight rates; the opportunity for shippers and for other carriers to challenge filed rates before they become effective; and the right of any party to challenge the lawfulness of rates at any time by filing a complaint with the Commission. See *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 184 U.S. 370 (1932). This scheme of regulation minimized upward and downward rail pricing flexibility, often preventing timely rate increases to adjust to changing costs and rate decreases to compete for traffic. This was especially true with regard to joint rates. A joint rate is filed in a tariff as a single rate over the lines of more than one railroad. *Southern Ry. Co.* v. *ICC*, 681 F.2d 29 (D.C. Cir. 1982). The participating carriers agree both to the level of the rate and the division of the total revenue among themselves. *L&N R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 230-234 (1925). Rail carriers are required under the Interstate Commerce Act to keep open through routes, but they are not required to maintain joint rates. See 49 U.S.C. 10703(a)(1), *United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 615, 619 (1945), and *Brown & Sons*

Lbr. Co. v. *L&N R.R.*, 299 U.S. 393 (1937). If, however, a carrier enters a joint rate, it may not change or cancel the rate (or the division of revenue) without concurrence of the other participants. Any unilateral change or cancellation of a rate[1] is subject to protest by connecting carriers and possible suspension and investigation by the Commission (49 U.S.C. 10705(e)).

Another key aspect of regulation affected by the exemption was car service. Railroads routinely interchange cars so that freight can move from an origin on one line to a destination on another without unloading and reloading the cargo at each junction point. See *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975). Each railroad pays a rental to the owning road for use of its cars. The ICC administers this system of rental payments known as "per diem." See *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 222 (1973). Over the years the Commission has, with the approval of this Court, tried various approaches to influence supply and demand to improve the efficiency of car use in the national car fleet. See *e.g.*, *Oregon Pacific*, *supra*, 410 U.S. 184, *Fla. East Coast*, *supra*, 410 U.S. 224, and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). None of these approaches has been entirely successful, especially with respect to boxcars.

The Commission found in the *Boxcar* cases that the combination of joint rate regulation, prescribed per diem, and mandatory interchange of cars between railroads gave receiving carriers no option but to accept cars and pay per diem regardless of whether the market justified the prescribed level of car hire. Consequently, surplusses and shortages of cars have been frequent. Also, it is uncontroverted that the system encouraged the cross-hauling of empty freight cars to

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[1] Except that 49 U.S.C. 10705a protects carriers from being required to continue participation in non-compensatory joint rates.

maximize per diem revenue. This inefficiency hindered the ability of railroads to control costs to stem diversion of traffic to the motor carrier industry.

The exemption provision, 49 U.S.C. 10505, requires the Commission to exempt a service when it finds that regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101a and not needed to protect shippers from an abuse of market power.

REASON FOR GRANTING THE WRIT

Congress has always given administrative agencies some discretion over what areas to regulate, but now with increasing frequency Congress is delegating to agencies broad latitude to determine the extent and the timing of deregulation. This is a case of first impression concerning the appropriate role of court and agency in carrying out these broad new delegations of exemption power.

In the case of the Interstate Commerce Commission, Congress has specifically directed it to remove as many restrictions on changes in rail prices and services as possible and to "adopt a policy of reviewing carrier action after the fact to correct abuses of market power." (H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad.News 105). The exemption power is inherently experimental because it contains its own revocation provision, and Congress even gave the Commission the power to impose or remove such exemptions with or without a hearing. The courts have recognized that every exemption requires the agency to make predictive judgments as to what will happen within the industry after the exemption. All of these factors suggest that the agency's initial assessment is entitled to a great deal of deference. That deference was not accorded here.

The court below affirmed the Commission's finding that regulation of boxcar rates is unnecessary to protect shippers form an abuse of market power but invali-

dated the important joint rate and car service aspects of the exemption. Although in two instances the court contended that the agency did not consider relevant factors, it is clear that those factors were considered but that the court just did not agree with the Commission's economic analysis.

Specifically, the Commission found that under the boxcar exemption:

(1) carriers will not cancel efficient through routes;
(2) large carriers will not undermine the health of Class III railroads; and
(3) the exemption taken as a whole will subject the car hire practices of all carriers to market forces and thereby reduce if not eliminate inefficiencies in the allocation and utilization of resources arising out of the former regulatory regime.

Each of these determinations is "primarily of a judgmental or predictive nature," the type of determination that requires the expert knowledge of the agency. See *FCC* v. *Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 813 (1978). But not only did the court decline to defer to the agency's judgment on any of these essential points, to a great extent it either overlooked or misconstrued the agency's explanation, and substituted its economic judgment for that of the agency. Especially with regard to exemptions from the Interstate Commerce Act, which the courts have recognized are inherently experimental (*American Trucking Ass'ns* v. *ICC*, 656 F.2d 115 (5th Cir. 1981)), the court should have refrained from making its own prediction as to what impact the exemption will have. Rather, the court should have deferred to the agency's predictive judgment and allowed the agency to correct any future shortcomings in such judgments by after the fact remedies such as the revocation provision of 49 U.S.C. 10505 or antitrust remedies. Furthermore, by foreclosing the Commission from granting a partial exemption from the

car service provisions of the Act, the court below has interfered with the agency's ability to deal with the vexatious and persistent problem of car supply and inefficient utilization of freight cars in a manner this Court has consistently condemned. *Oregon Pacific, supra*, *Allegheny Ludlum, supra*, *Florida East Coast, supra*.

The importance of these issues is underscored by the fact that approximately one fifth of all traffic moving by rail moves in boxcars. In addition, as the court of appeals itself has recognized, requiring reinstitution of regulation of joint-line rates while single-line rates remain exempt could cause disruption in the rail boxcar freight market (slip op. 92; App. A, 92a):

> In so doing we are admittedly concerned that the resulting situation—in which joint rates remain regulated but other rates are not regulated—could cause a disequilibrium in the Commission's deregulation policy as well as in the transportation market, *i.e.*, shippers might tend in some cases to move away from using unregulated single carrier routes in favor of through routes, or vice-versa, or other dislocations in the boxcar freight market might ensue.

In sum, because this case involves an issue of first impression that was wrongly decided by the court below and may have a significant impact on the railroad industry and upon the Commission's ability to carry out its deregulatory mandate from Congress, this Court should grant a writ of certiorari.

A. The Court Erred in its Decision to Invalidate the Joint Rate Exemption for Boxcars

The court below held that the Commission failed to answer two joint rate questions: (1) Why will carriers not cancel efficient joint routes to favor their own single line routes?; and (2) Will small carriers be deprived of a "fair" division of revenue on joint movements? The

court believed that a "logical gap" existed in the Commission's reasoning on the first question and found that the Commission did not discuss the second question at all. To the contrary, the Commission has fully considered both of these issues, but the court in the first case completely misconstrued the agency's explanation, and in the second has overlooked the explanation.

The court supplied its own economic analysis, which is inconsistent with: (1) Part II of the court's decison dealing with the potential for abuse of market power, and (2) the Commission's own analysis which is based on sound economic principles that, as detailed below, have been upheld in the District of Columbia Circuit and other Federal Courts. In so doing the court has improperly intervened into matters of economic policy specifically delegated by Congress to the Commission. *Chevron* v. *NRDC*, No. 82-1005 (June 26, 1984), slip op. 27-28.

THE COURT ERRED IN REJECTING THE COMMISSION'S FINDING THAT UNDER THE EXEMPTION LARGE LONG-HAUL CARRIES WILL NOT CANCEL THEIR MORE EFFICIENT JOINT CONNECTIONS WITH SMALLER CARRIERS

The Commission has consistently maintained (in this case and others noted below affirmed in the Federal Courts)[2] that, in the face of pervasive competition,

[2] The Commission explained the economics of joint rate cancellations in detail in *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), *aff'd* in relevant part but *rev'd*. on other grounds *sub nom. Detroit, T. & I. R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984) cited at *Boxcars II*, 367 I.C.C. 754 (App. E, 162a). In *Central Vermont Ry.* v. *ICC*, 711 F. 2d 331 (D.C. Cir. 1983) the court affirmed the Commission's finding that because of pervasive competition from other modes rail carriers can not afford to cancel efficient routes. See also *Chesapeake & Ohio Ry.* v. *United States*, 704 F. 2d 377, 317 (7th Cir. 1983) and Ex Parte No. 445, *Standards for Intramodal Rail Competition*, 48

large long-haul carriers will not close efficient routes in which they participate in connection with small short-haul carriers. Put in its simplest terms, this would be tantamount to a manufacturer producing a component of its product when it can buy that component for less from another producer. By doing so a carrier would be imposing an unnecessary handicap on its ability to compete effectively with other modes. The Commission was certainly justified in finding that under the exemption carriers would be unlikely to engage in cancellations that are directly contrary to their own self-interest.

The court rejected the Commission's explanation of this issue because it misread a single sentence in *Boxcars I*, 367 I.C.C. 444 (App D, 124a). There the Commission said that "route closings might occur if a carrier wishes to close routes that involve long hauls over the lines of connecting railroads in order to concentrate traffic over its own lines." The court erroneously construed this sentence as an admission "that large carriers have an incentive to close off efficient competing routes to gain monopoly power over a haul from a given origin to a given destination" (slip op. 42-43). Actually, the Commission's sentence does not mention market power or closing of efficient routes at all, but merely refers to "concentration" of traffic, a process of achieving greater efficiency through higher traffic density which is lawful even under regulation.

The court's reading of this isolated sentence as an admission that carriers will attempt to monopolize[3] boxcar

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Fed. Reg. 31672, 31674 (July 11, 1983) cited at *Boxcars II*, 367 I.C.C. 753 (App E, 161a).

[3] The panel said that Commission Counsel's reference to antitrust remedies was *post hoc* rationalization (slip op. 43; App A, 43a). In our petition for rehearing we pointed out to the court that it overlooked specific language in *Boxcars I*, 367 I.C.C. 442 (App. D, 122a), as follows:

traffic by cancelling joint routes is unreasonable. First, it is directly contrary to the court's affirmance (in Part II of its decision) of the Commission's finding that boxcar transportation is subject to pervasive competition from other modes, especially trucking. This motor competition assures that a railroad cannot gain monopoly power over boxcar traffic by eliminating rail competition, so that carriers would have no incentive to attempt to exclude their rail competitors for this purpose. Second, the "admission" reading suggested by the court was not urged or argued by any petitioner and is contrary to the Commission's position throughout the *Boxcar* decisions and in every decision involving joint rates that the Commission has issued over the last 5 years.[4]

The Commission's explanation of the efficient routings point throughout the three *Boxcar* decision is

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> It is also important to recognize that the antitrust laws provide a remedy against attempted monopolization by means of predatory pricing.

Thereafter the court on August 24, 1984, modified its decision to say (App. B, 94a, 95a):

> While the ICC itself mentioned antitrust laws as a possible remedy for predatory pricing by large railroads against small railroads generally, *see Boxcars I*, 367 I.C.C. 442 (App. D, 122a), it never mentioned antitrust remedies either as a deterrent to potential monopolizing stemming from the relationship created by co-participation in joint rates or through routes or as an after-the-fact remedy that would correct such abuses by large carriers, *see Boxcar I*, 367 I.C.C. 443-44 (App. D, 123a-124a).

[4] Further, as pointed out in our brief (p. 62) and not controverted in petitioners' reply brief, petitioners have failed to come forward with even one concrete example where a carrier subject to effective competition has cancelled a more efficient joint rate merely to favor its single line rates. See slip op. 27 (App. A, 27a), where the court below relied in approving the maximum rate exemption upon the fact that there has been only one finding of market dominance on boxcar traffic since 1976. The court should give weight to the absence of past abuses with regard to route cancellations as well.

clear. The Commission found in *Boxcars I* "that it is unlikely that a carrier acting in a economically rational manner would close efficient routings . . ." 364 I.C.C. 444 (App. D, 124a). In *Boxcars III*, p. 6 (App. F, 200a), the Commission explained:

> Where particular joint routes are not the most efficient routes available, the public interest (and the governing statute, 49 U.S.C. 10905(e)) favors their elimination. Only by concentrating on the most efficient routes can carriers meet the pervasive competition they face on boxcar traffic. If a route is the most efficient available, the carriers should preserve it if they are to keep their costs down and remain competitive, whether it is a single or a joint line movement.

As the United States Court of Appeals for the Seventh Circuit recognized in *Chessie, supra*, 704 F.2d 373, 377 for a large carrier to cancel its efficient joint rates in an unregulated environment "would be commercial suicide." Thus even were the court below entitled to substitute its projection of the future course of rail competition for the Commission's (as we submit it is not), the lower court's analysis (not the Commission's) is flawed because it fails to take account of economic realities.

2. The Court Erred by Overlooking the Commission's Analysis that the Exemption Will Not Allow Large Carriers to Force Small Carriers to Accept Revenue on a Joint Movement That is Inadequate to Support Their Financial Health.

The court below found that the Commission "*totally ignored*" (slip op. 45; App A, 45a) the issue of a "fair division of revenues" between rail carriers.[5] The court said that the large carrier could "use its monopoly

[5] The parties merely argued on brief that efficient joint rates would be cancelled and their ability to participate foreclosed, not that their division would be squeezed. The court addressed this latter issue sua sponte.

power to *usurp* profits that the small carrier *deserves* because it has the more efficient route" (*id.*, emphasis supplied) and that it is "*self evident* to us that such use of monopoly power by large carriers to usurp the efficiency gains of the smaller carrier would not comport with the rail transportation policy of 49 U.S.C. 10101a . . ." (*id.*, emphasis supplied).

Contrary to the court's statement, the Commission did fully analyze and discuss the relative bargaining strength of large and small carriers throughout its decision. Further, that explanation is clearly stated and based on sound economic theory. As the Commission explained in *Boxcars II*, 367 I.C.C. 753-54 (App E, 161a-162a), the rail transportation policy strongly favors competitive ratemaking. Boxcar traffic is very susceptible to diversion to other modes and will not tolerate excessive rate increases:

> What matters to the shipper is the origin-to-destination rate, not the size of the connecting railroad of origin or destination. In other words, after excessive rate increases on boxcar traffic, diversion would take place regardless of whether the traffic moved jointly with a Class III railroad or moved solely on a Class I railroad. This gives long haul Class I railroads an incentive to hold down rates that they would charge for transportation to junctions with Class III carriers in the absence of joint (single factor) rates for the origin-to-destination movements.

Further, because the segments of through rates would be independently controlled under the exemption, each carrier would be free to set its rate for the service it provides, based on its own costs and revenue needs. Therefore, no carrier, large or small, would be locked in by regulation to a fixed and inadequate division of revenue.

The Commission explained in *Boxcars II* that size cannot be assumed to translate to bargaining strength because (367 I.C.C. 766; App. E, 174a):

> large carriers have no incentive to drive them (smaller carriers) out of business.... The shortlines are secure in their markets as long as they continue to provide needed services and generate valuable traffic.

The Commission has also noted that "major railroads depend on short lines to do the retailing of boxcar service" (*Boxcars II*, 367 I.C.C. 775; App E, 183a) and that

> short line railroads with their greater staffing flexibility and their attention to local needs, are often able to operate successfully over lines that major railroads have abandoned as unprofitable, *id*.

For these reasons, the Commission said that "short lines and majors have become indispensable partners of one another in the handling of a substantial amount of rail traffic" *id*.

The Commission also explained in *Boxcars III* (p. 5; App. F, 198a) that the major railroads "can not afford to undermine the *health* of the Class III carriers that supply them with an essential flow of traffic." (emphasis supplied) The Commission explained that

> the penalty for a large connecting carrier that fails to allow the small carrier its *required revenue* is loss of this traffic and loss of a contribution toward its own capital costs (*id.*, emphasis supplied).

The Commission did not say that the large carrier would be forced to yield the smaller carrier a marginal return or just enough to keep it in business in the short run, as the court contends (slip op. 46; App. A, 46a). Rather, the Commission emphasized that carriers need to allow their connections a "healthy" return and "required revenues." The Commission and the courts have consistently recognized that rail carriers need to achieve a cost of capital rate of return in order to re-

place their plant to provide needed services. The Commission is keenly aware that if Class III carriers are not permitted adequate revenues to remain healthy, then the quality of service they provide will quickly deteriorate. In the face of vigorous service and price competition, railroads providing boxcar service cannot afford to allow that service to decay because that will result in a immediate loss of traffic. Rather, the carriers, as the Commission has noted, are "indispensable partners" (*Boxcars II*, 367 I.C.C. 775; App E, 183a) in the provision of the most efficient service possible, in competition with other modes.

The court's analysis is not only directly inconsistent with the agency's analysis, it is also based on economic assumptions that cannot be squared with the court's affirmance of the Commission's maximum rate exemption in Part II. It is logically inconsistent for the court to find in Part II that railroads do not have monopoly power vis-a-vis shippers and at the same time conclude in Part III that individual carriers may be able to extract economic "rents" from a movement by exploiting their connections (slip op. 44-45; App A, 44a-45a). ("Rents" are generally defined as the excess above a normal profit in a competitive marketplace.) Contrary to the court's assertion in footnote 1, carriers providing boxcar service are not "in a position to reap and divide among themselves the rewards of their operating efficiencies where such efficiencies exist." *Id.* The record is clear and undisputed that the market share of the railroads has been rapidly declining especially because of motor carrier competition, *Boxcars III*, p. 11; App F, 210a. In fact, the Commission has specifically found that in this particular competitive market, it is necessary for rail carriers continuously to increase efficiency just to maintain their market share, *Boxcars*, 367 I.C.C. 774; App E, 182a. This serious mistake regarding an economic issue that is absolutely fundamental to

the Commission's decision underscores the impropriety of an appellate court substituting its own economic analysis for that of the agency.

The court also assumes that small carriers "deserve" to receive the rents that are generated by efficiency gains. But the essence of transport competition is that shippers, not carriers, benefit (through lower rates) from the gains generated by increased transport efficiency. See *Railroad Consolidation Procedures, General Policy Statement*, 363 I.C.C. 241, 245 (1980). Rail boxcar carriers large and small, benefit from increased efficiency by maintaining or increasing their market share, not by enjoying monopoly profits.

In short, the court has reversed the Commission, not because of the Commission's failure to consider relevant joint rate issues, but because of the court's failure to recognize that consideration and the court's substitution of its own erroneous economic analysis.

B. The Exemption, when Viewed in its Entirety Results in a Decrease in Regulation and in a "Market" for Boxcar Car Hire Services

The essential premises of the court in invalidating the car hire exemption are that it does not result in a decrease in regulation, that it does not create a market for boxcar services, and that it is therefore not a valid exemption (slip op. 58-61; App A, 58a-61a). In reaching these conclusions the panel has totally overlooked the Commission's analysis of several crucial factors, has substituted its own economic analysis for the Commission's, and in so doing it has reached the wrong result.

The Commission exempted carriers from car hire regulation to the extent necessary to permit carriers to: (a) negotiate bilateral agreements concerning car hire; (b) impose empty return charges not to exceed 35 cents per mile; and (c) offset car hire charges on idle cars by

imposing storage charges after holding a car for 3 days. These actions were not possible before the exemption.

Under regulation terminating carriers had little bargaining power because per diem was prescribed, joint rates regulated and car interchange mandatory. Terminating carriers were forced by regulation to accept cars regardless of the revenue obtained. The record shows that the regulatory system created inappropriate incentives for boxcar investment, and tremendous unnecessary movement of cars. The Commission found that this system, while it benefited certain car supplying carriers (originating carriers), has hampered the ability of the railroads to control their own costs and compete effectively with other modes.

The Commission exempted from regulatory requirements joint rates and certain car hire pricing practices necessary for terminating carriers to escape the restraints previously imposed by the combined effects of mandatory interchange, regulated joint rates and divisions and prescribed per diem. It allowed the terminating carrier to say "I will not accept your terms. If you insist on inefficient car handling practices I will impose empty return charges to defray my costs of handling empty cars."

The court held that the Commission can adopt either partial or complete exemptions as long as they result in decreased regulation, but found that the Commission erred by using the exemption power to create a regulatory guarantee for terminating carriers (slip op. 60; App A, 60a):

> In allowing storage charges and return fees the Commission, rather than deregulating, has altered the relative bargaining positions of the carriers and has influenced the allocation of the benefits that will flow from the cost savings associated with decreasing market inefficiencies.

The court failed to perceive the relationship of the joint rate exemption to the car hire exemption. Under the total exemption package all carriers can adjust their rates and charges (in combinations) freely to recoup the costs of empty return charges. The Commission explained that:

> Short lines that say an empty return charge would put them out of business imply that they cannot afford to absorb this increased cost and that they would have no way to recoup it. In fact, however, they can recover any nonabsorbable cost by increasing their freight rate. The destination carrier will be faced with the reality that the originating carrier must increase its freight rate to stay in business, that the shipper will not pay a higher total freight rate, and that the destination carrier must therefore make an offsetting reduction in its own freight rate to preserve the business. Because the destination carrier will now be receiving revenue for empty returns from the origin carrier, it will require less revenue from the shipper, and can therefore afford to reduce its freight rate. It clearly will do so if the alternative is to lose profitable business.

The court also overlooked the fact that originating carriers can freely increase their revenues when the car hire market is strong by increasing their portion of the exempt freight rate or by entering bilateral agreements also authorized by the exemption. See *Boxcars II*, 367 I.C.C. 769; App. E, 177a. Thus, the Commission has not created a "one way market" where car hire revenues can only be decreased from the prescribed level. Prescribed per diem can easily and lawfully be circumvented under the *Boxcar* exemption by either originating or terminating carriers, but *only to the extent the market allows*. Thus the Commission has reduced regulation and has created a market for car hire services. Consequently, the court's decision that the agency

has made an improper use of the exemption power (by shifting "regulatory entitlements" rather than creating a "market") should be reversed.

Moreover, by foreclosing the Commission from using the exemption power to permit market forces rather than regulation to allocate boxcar resources the court below has impermissibly circumscribed the Commission's ability to remedy problems of national car supply and use in a manner condemned by this Court on at least three separate recent occasions.

In *ICC* v. *Oregon Pacific*, 410 U.S. 184, this Court reversed the decision of a three-judge District Court invalidating the Commission's entrance of an emergency car service order because the lower court's reading of the Commission's statutory responsibility for the supply and utilization of cars was too narrow. Similarly in *United States* v. *Allegheny Ludlum*, 406 U.S. 740 (1972), this Court reversed the decision of a three-judge court finding that the ICC's is nationwide car service rules ("intended to make those railroads whose undersupply of freight cars contributes to the national shortage more directly feel the pinch . . ." *id.* at 745-46) were unreasonable. So too in *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973), this Court reversed a District Court decision invalidating industry-wide per diem rates for freight car use.

Finally, the action of the court below conflicts directly with the holding of this Court in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981), where this Court held the District of Columbia Circuit improperly prevented the FCC from permitting market forces, rather than regulation, to determine program content with regard to FCC station licenses. The FCC had no express exemption power comparable to that under which the Commission was acting in the instant case. If, as this Court held, the FCC can use its general powers as an administrative agency to deregulate a significant area,

a fortiorari the Commission, acting pursuant to an express congressional mandate to deregulate, should have been permitted to do so as well.

CONCLUSION

For the foregoing reason the Court should grant the petition for a writ of *certiorari*. If the Court is not inclined to give plenary consideration to the case, the Government believes it to be a suitable candidate for summary reversal based on the precedents of this Court discussed immediately before.

Respectfully submitted.

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